

**Application No. 09/708,944****Atty Docket: BLFR 1000-1****REMARKS**

Claims 1-13 and 15-111 are pending in this application. Claims 34-64 and 86-111 have been withdrawn from consideration, leaving claims 1-13, 15-33 and 65-85 for further prosecution in this application. These claims presently stand rejected. Claims 112-115 have been added. Claims 15 and 24 are cancelled by this amendment.

In the Office Action, the Examiner objected to claims 67, 68, 82 and 83 as being dependent upon rejected base claims, and indicated that these claims, if rewritten to include certain limitations, would be allowable.

**Claim Rejections under 35 USC 101**

The Examiner asserts that in claims 1, 26 and 65, the steps of retrieving and adjusting "are not performed using said computer," presumably acknowledging by reference to "said" computer that each of the claims is for "A computer-implemented method." The first four words of each claim make it clear that the method is performed using a computer; otherwise, the claims read as a whole could not be for a computer-implemented method.

Recitation in the preamble of "A computer-implemented method" has often been considered sufficient to satisfy Section 101. *See, e.g.*, USP 6,308,162, claim 1 (Examiners Jeanty and Hafiz); USP 6,505,167, claim 1 (Examiners Jeanty and Choi); USP 6,061,658, claim 1 (Examiners Jeanty and MacDonald).

Without narrowing the claims, Applicant has amended them so that they now read, "A computer-implemented method ..., the computer-implemented method including:" This amendment conforms to USP 6,122,623, claim 1 (Examiners Jeanty and Stamber).

Applicant is not aware of any new rule making, interpretive document or amendment of MPEP 2106 that would apply different rules to examining this application than were applied to the applications cited above, in which wording of the preamble established statutory subject matter.

Accordingly, the Section 101 rejection is traversed and the claims should be allowable as amended.

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**Claim Rejections under 35 USC 102**

The Examiner rejected claims 1-6, 10-11, 15, 24-25, 65-66, 70, 72, 74, and 76-79 under 35 USC 102(e) as being anticipated by Huang et al. (USP 5,953,007). Huang discloses an agile supply management chain adapted to manufacturing. Because demand for manufactured goods drives vendor managed replenishment (VMR) of distribution centers, Huang includes discussion in cols. 68-71 of stores. These columns of the disclosure do a much better job of explaining how Huang avoids using store-specific data than the cited passages in columns 42, 55, 56 and 75. In cols. 68-71, Huang teaches away from using store-specific data three times and never suggests using store-specific data. In particular, Huang says, "Note that we do not require the data ... which represents standard deviation of demands at individual stores." Col. 69, lines 41-43. In addition, "The stock-out probability is defined as the probability of shortage in at least one of the stores [not any particular store] replenished by the DC." Col. 70, lines 50-52. Similarly, "Lead-times from each Plant to each DC and (an average) from each DC to its Stores" is an input to the vendor managed replenishment contract setup. Col. 71, lines 33-34. Teaching away from using store-specific data is not surprising for this manufacturing supply chain application, as the manufacturer will have limited access to and little interest in the store level operations of retailers. With this understanding of Huang in mind, we turn to the specific rejections.

The independent claims have been amended. Claim 1, for instance, now reads:

1. (currently amended) A computer-implemented method for adjusting a retail location-product specific ~~reference~~ selling profile for a ~~reference~~ product, comprising:

retrieving at least one or more retail location-product specific selling profiles ~~profile that includes accumulated~~ ~~corresponding to~~ daily or more frequent historical data for at least one or more ~~reference~~ products;

accessing a retail location promotions calendar that includes historical data that tracks promotion of the product at the location; and

adjusting the historical data in the retail location-product specific ~~reference~~ selling profiles to correct for one or more promotions of the product at the retail location ~~which impacted the historical data.~~

It seems that the Examiner considered distribution centers (DCs) in Huang to be locations. The amended claim now refers to a "retail location-product specific selling

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profile that includes accumulated daily or more frequent historical data for at least one product". This limitation is not met by Huang, which teaches away from using retail store-specific data; nor is it met by raw point of sale data.

Notably, the claim amendments do not present new issues and should not require a new search. Claims 15 and 24 have been cancelled, due to the substantial overlap between those dependent claims and the amended independent claim 1.

Where Huang retrieves "product and customer combination" data, in the cited col. 42, lines 1-8, this is aggregated data, not store level data. Inventory profiles are aggregated in Huang, perhaps before the manufacturer receives data, and clearly are not maintained at or desired for specific stores.

Where Huang adjusts profiles to account for promotions, in the cited col. 56, lines 3-8, the mechanism does not access store-specific information about retail location promotions. Huang's teaching of eliminating data points influenced by a promotion is very theoretical and at a mathematical/statistical/probabilistic level. As an example of the level of skill in the art, this reference shows substantial ignorance of or disregard for retailing operations. There is no mention of a retail calendar, of preferential display of products or special selling days. A "display" for Huang is part of a GUI, not a fixture in a store. Instead of differentiating among retailing events, Huang proposes generalized mathematical approaches (cols. 54-56) to "allow for a general pattern of impacts". Col. 55 lines 5-6. Huang does not take into account variations in roll-out among individual retail locations, because Huang teaches away from using store-specific data. In any case, Huang does not include a retail location promotions calendar and does not attempt to perform corrections to a "retail location-product specific selling profile that includes accumulated daily or more frequent historical data for at least one product".

Accordingly, the independent claims and claims that depend from them should be allowable, as amended.

Independent claim 25 and dependent claims 16-23 address stock-outs at particular retail locations. A stock-out is when there are no goods on display for a customer to see and buy. In some instances, a stock out results from having no inventory. In other instances, too little shelf space is devoted to a popular item for it to remain on the shelf between restocking shifts. Stock outs at particular retail locations

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are not accounted for by Huang; nor are stock-outs resulting from restocking cycles, as distinguished from lack of inventory. In cols. 27, 60-61, 68-71, 76-77 and 83, stock-out is mentioned by Huang. Every time Huang mentions a stock-out, it is discussed as a probabilistic matter, so that probabilities can be calculated in order to reach a predicted service level. Using probabilities in this way avoids tracking stock outs at particular retail locations. (Recall from Huang, "[W]e do not require the data ... which represents standard deviation of demands at individual stores." Col. 69, lines 41-43.)

None of the discussions of stock-outs in Huang address stock outs at particular retail locations. Accordingly, dependent claims 16-23, independent claim 25 and dependent claims 26-33 should be allowable over Huang.

Independent claim 80, as amended, addresses adjusting retail location distribution shares to take into account actual sales results. Retail clothing, for instance, is sometimes divided into fashion and basic goods. Fashion goods change from season to season: fall, winter, spring and summer. This year's fall fashions will be out of fashion next fall. Production of fashion goods necessarily is much different from production of basic goods, such as white T-shirts. Projected sales must be used at the outset of a new fashion season, because there is no actual history. The claim calls for adjusting distribution shares of goods that go out to retail sales locations to take into account actual sales as experience is acquired.

The cited columns 55-56 of Huang have nothing to do with correcting forecasts to reflect initial sales of seasonal goods. Instead, a time-series approach to determining a promotion impact-curve is disclosed. The cited columns 55-56 do not address the weighted mix of projected and actual sales limitation of claim 80.

Accordingly, claim 80 and the claims that depend from it, claims 81-85, should be allowable over Huang.

### **Claim Rejections under 35 USC 103**

The Examiner rejected claims 7-9 under 35 U.S.C. 103(a) as being unpatentable over Huang et al, (USP 5,953,707) in view of Bakalash et al. (USP 6,434,544). Huang "fail[s] to disclose wherein the adjusting to correct for seasonal selling effects step include ratioing the references selling profiles with a general profile comprising historical

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data for non-promotional products.” The Examiner relies on Bakalash et al., col. 1 line 48 through col. 2 line 15, for that element. The cited passage of Bakalash et al. teaches a tool to “allow knowledge workers to intuitively, quickly and flexibly manipulate operation data” in arbitrary ways, but does not teach the claimed “ratioing the retail location-product specific selling profiles with an aggregate profile that includes historical data for non-promoted products.” As there is no teaching in either of the references to distinguish between non-seasonal or basic products (claim 8) and seasonal or fashion products (claim 9), the combination of two references cannot supply elements that cannot be found in either reference.

As the claimed elements are not found in either of the references that the Examiner proposes to combine, they cannot magically appear in the combination. Therefore, claims 7-9 should be allowable over the cited references.

The Examiner rejected claims 10-13 regarding special selling days on a single reference obviousness basis, citing Huang. When the Examiner is further considering the Section 103 rejection, some legal principles should be kept in mind. For a single reference Section 103 rejection, the Examiner needs to provide evidence of a teaching or suggestion to extend the reference to include the claimed features that admittedly are not part of the reference. It is fundamental, as indicated in MPEP Section 2143.01, that the Examiner rely on some evidentiary quality suggestion to modify Huang:

Obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either explicitly or implicitly in the references themselves or in the knowledge generally available to one of ordinary skill in the art. “The test for an implicit showing is what the combined teachings, knowledge of one of ordinary skill in the art, and the nature of the problem to be solved as a whole would have suggested to those of ordinary skill in the art.” *In re Kotzab*, 217 F.3d 1365, 1370, 55 USPQ2d 1313, 1317 (Fed. Cir. 2000). See also *In re Lee*, 277 F.3d 1338, 1342-44, 61 USPQ2d 1430, 1433-34 (Fed. Cir. 2002) (discussing the importance of relying on objective evidence and making specific factual findings with respect to the motivation to combine references); *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988); *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992).

The latest update to this section of the MPEP cites *In re Lee*, in which the Federal Circuit clarified the need for evidentiary quality support of an Examiner's factual basis

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for finding a teaching, suggestion or motivation in the prior art (as opposed to the Examiner's opinion), 277 F.3d at 1343-44:

As applied to the determination of patentability *vel non* when the issue is obviousness, "it is fundamental that rejections under 35 U.S.C. § 103 must be based on evidence comprehended by the language of that section." *In re Grasselli*, 713 F.2d 731, 739, 218 U.S.P.Q. (BNA) 769, 775 (Fed. Cir. 1983). ... "The factual inquiry whether to combine references must be thorough and searching." *Id.* It must be based on objective evidence of record. This precedent has been reinforced in myriad decisions, and cannot be dispensed with. [citation omitted] The need for specificity pervades this authority. *See, e.g., In re Kotzab*, 217 F.3d 1365, 1371, 55 U.S.P.Q.2D (BNA) 1313, 1317 (Fed. Cir. 2000) ("particular findings must be made as to the reason the skilled artisan, with no knowledge of the claimed invention, would have selected these components for combination in the manner claimed"); *In re Rouffet*, 149 F.3d 1350, 1359, 47 U.S.P.Q.2D (BNA) 1453, 1459 (Fed. Cir. 1998) ("even when the level of skill in the art is high, the Board must identify specifically the principle, known to one of ordinary skill, that suggests the claimed combination. In other words, the Board must explain the reasons one of ordinary skill in the art would have been motivated to select the references and to combine them to render the claimed invention obvious."); *In re Fritch*, 972 F.2d 1260, 1265, 23U.S.P.Q.2D (BNA) 1780, 1783 (Fed. Cir. 1992) (the examiner can satisfy the burden of showing obviousness of the combination "only by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings of the references"). ... In its decision on Lee's patent application, the Board rejected the need for "any specific hint or suggestion in a particular reference" to support the combination of the Nortrup and Thunderchopper references. Omission of a relevant factor required by precedent is both legal error and arbitrary agency action.

The outcome of cases decided even before *In re Lee* makes it clear that real evidence is required to support an asserted teaching, suggestion or motivation to modify a single reference for obviousness. *See, e.g., In re Kotzab*, 217 F.3d 1365, 1369-70 (Fed. Cir. 2000) (rev'd finding of obviousness, as "Even when obviousness is based on a single prior art reference, there must be a showing of a suggestion or motivation to modify the teachings of that reference."); *Kolmes v. World Fibers Corp.*, 107 F.3d 1534, 1541 (Fed. Cir. 1997) (aff'd patent not invalid, as no suggestion to modify the '989 patent with regard to non-metallic fibers).

Applicant urges the Examiner to withdraw this Section 103 rejection of claims 10-13, because the single reference cited admittedly does not include all of the claimed limitations and there is no evidentiary quality support for extending the single reference.

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(Nominally, claim 10 was rejected under Section 102, but the rationale related to special days all appears under Section 103, so we treat rejection of claim 10 as under Section 103.)

Huang does not include any reference to special selling days, as explained above. Huang ignores or disregards this feature of retail sales and teaches a generalized mathematical approach, which is at odds with identifying and correcting for special selling days. (We cannot quite say that Huang teaches away from special days, because Huang exhibits a level of skill in the art that is better characterized as ignorance.)

Applicant respectfully submits that claims 10-13 should be allowable over Huang.

The Examiner rejected claims 16-23 and 26-33 on a single reference obviousness basis, citing Huang. All of these claims include a stock out element that is addressed above. The Examiner acknowledges that the claimed features are not disclosed in Huang. The Examiner's rationale here is much too thin. The Examiner does not even identify the claimed features, referring to them only as "the recited features." There is no evidentiary quality support for extending Huang to include the claimed stock out element. As explained above, Huang teaches away from using store-specific sales data and teaches using aggregate approaches to stock outs. Therefore, Huang is not extendable, even if the Examiner were to offer some evidentiary quality support for adding a new feature to Huang.

It is unclear how the Examiner would extend Huang to reach the claimed stock out features on a store-specific basis. Further explanation is requested.

For these reasons, claims 16-23 and 26-33 should be allowable over Huang.

The Examiner rejected claims 69, 71, 73 and 75 without any written description (in the Office Action) of the claimed features. They are generically called "the recited features." In fact, the claimed features combine sales projections that take into account planned promotions with adjusting profiles for promotion starting and ending dates (69), advertising (71), preferred display (73) and reduced pricing (75). The generalized motivation "to increase sales" is very weak. It might suffice to explain why retailers use these marketing approaches, but it surely is not enough to meet the *In re Lee* standard for providing evidentiary quality support for a single reference Section 103 rejection.

Accordingly, claims 69, 71, 73 and 75 should be allowable over Huang.

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**Information Disclosure Statement**

An Information Disclosure Statement follows this Response by mail.

**CONCLUSION**

Applicant respectfully submits that the pending claims are now in condition for allowance and thereby solicits acceptance of the claims, in light of these amendments.

The undersigned can ordinarily be reached at his office at (650) 712-0340 from 8:30 to 5:30 PST, M-F and can be reached at his cell phone (415) 902-6112 most other times.

Respectfully submitted,

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